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No. 89-369

**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 1989

GENERAL MOTORS CORPORATION,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Supreme Court on appeal from the First Circuit, United States Court of Appeals

# Brief of Mid-America Legal Foundation as Amicus Curiae supporting the position of petitioner

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## TABLE OF AUTHORITIES

CASES:

U.S. v. General Motors Corp., 876 F. 2d 1060 (1st Circuit, 1989)

American Cyanamid Co. v. EPA, 810 F. 2d 493 (5th Cir. 1987)

STATUTES:

Clean Air Act, 42 USCA § 7410 (a) (3) (A)

## INTEREST OF AMICUS CURIAE

Mid-America Legal Foundation ("MALF") is a non-profit Illinois corporation. MALF has an interest in the disposition of the case which is before this Court on writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit in United States vs. General Motors, 876 F. 2d 1060 (1989, 1st Circuit), based on the expertise and purpose of this organization.

MALF was organized in 1975 to engage in legal research, study and advocacy for the benefit of the general public. MALF takes special interest in issues of national scope that have a direct impact on the Midwest region, namely Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin.

The Midwest region is one of the most important manufacturing areas of the nation. Many of the states in the Midwest

are within the purview of the USEPA Region 5, which had 83 "Source Specific" SIP (State Implementation Plan) variances awaiting Agency approval or disapproval as of the end of 1989. The issues before the Court have direct application to the industries and states in the Midwest.

## SUMMARY OF ARGUMENT

The USEPA cannot claim it lacks resources to comply with the statutory four month deadline for deciding a SIP variance, where it has sufficient staffing to bring an enforcement action against that same regulated entity.

## ARGUMENT

First of all, this court should affirm the ruling of the First Circuit holding that the four-month rule applies equally to SIP revisions as to original SIP's. Clean Air Act, 42 USCA § 7410 (a) (3) (A). This is the most logical result, in light of the

statutory scheme which requires swift action by all concerned.

The First Circuit has indicated that the USEPA cannot be expected to act on all SIP variance applications within the four-month time allotment, as it lacks the necessary resources to do so. However the actions of the Agency prove that this is not the reason for its failure to act in a timely manner. This can be seen by the fact that the Agency frequently brings enforcement actions against the very companies which have applications pending for SIP variances.

**Certainly an approval or disapproval of a SIP variance takes less effort for the Agency than commencing litigation against the company.**

The rule set forth in American Cyanamid Co. v. EPA, 810 F. 2d 493 (5th Cir. 1987) is logical and fair, in that the Agency has within its control the option of

handing down a decision as to the SIP variance. This procedure would provide the company advance knowledge as to its position, and it could then act accordingly.

It is absurd for the Agency to say, on the one hand, that it lacks the resources to hand down a timely decision as to a SIP variance, but meanwhile it has the resources to bring litigation with respect to the same issue which is the subject of the SIP variance.

The First Circuit suggests the trial court may take into consideration the Agency's tardiness as to the SIP variance, in its decision as to the amount of the penalty against a company for its violation of the underlying SIP. But such a plan would lead to a totally unworkable system, in that a regulated industry would have no means of knowing in advance whether its course of conduct was legal within the applicable time frame.

Consider the following hypothetical: The USEPA brings an enforcement action against a company while its requested SIP variance is "pending". The Agency then obtains a judgment and penalties. After that, it grants the SIP variance. The EPA thus obviates the right to obtain the penalties which it already has extracted.

The lack of due process rights to the states and to the regulated industries is unavoidable if the Agency prevails in this matter, and is permitted to bring enforcement actions while SIP variance requests languish far in excess of the four months allowed for decision.

## CONCLUSION

The Agency should be granted some deference in its activities promoting a cleaner environment for the next generation. On the other hand, this Court ought not allow needless trampling of due process

rights to the regulated industries, and even to the States which have in good faith approved the SIP variance requests before they are submitted to the USEPA.

The USEPA ought to be compelled to make a decision as to a SIP variance request, or delay enforcement until such decision can be made. Such a practice by the USEPA would protect the environment and the rights of the regulated entities.

Respectfully submitted:

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